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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JERRY NEHL BOYLAN, Defendant.	No. CR 22-482-GW GOVERNMENT'S OPPOSITION TO DEFENDANT'S OBJECTIONS TO THE PRESENTENCE REPORT (DKT. NO. 415); EXHIBITS 1-4

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorneys Mark Williams, Matthew O'Brien, Brian Faerstein, and Juan Rodriguez, hereby files

its opposition to defendant JERRY NEHL BOYLAN's Objections to the Presentence Report (Dkt. No. 415).

This opposition is based upon the attached memorandum of points and authorities and exhibits thereto, the Presentence Investigation Report ("PSR") and United States Probation Office ("USPO") sentencing recommendation letter, the government's previously-filed sentencing position, trial testimony and exhibits, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: April 23, 2024

Respectfully submitted,

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I. INTRODUCTION

Defendant's Objections to the Presentence Investigation Report read like a textbook in revisionist history. The defense puts forth a counterfactual narrative of what led to the deaths of defendant's 34 innocent victims on September 2, 2019 -- continuing to show defendant's lack of contrition and appreciation for the atrocity he caused.

The PSR correctly calculates the Guidelines range and contains an accurate and appropriate recitation of the facts. In response, the defense misstates the law, relying on overruled case law and obfuscating with no authoritative support. The defense misstates the facts, misleadingly cherry-picking from the record and omitting material information that supports the factual statements they contest.

Defendant did not file Rule 29 or Rule 33 motions challenging the sufficiency or weight of the evidence, presumably in recognition of the overwhelming evidence of his guilt. Yet the defense takes this opportunity to try to rewrite the record of defendant's misconduct and recklessness. The Court should overrule all of defendant's objections to the PSR.

II. DEFENDANT'S LEGAL OBJECTIONS TO THE PSR'S GUIDELINES ANALYSIS SHOULD BE OVERRULED

A. Abuse of Position of Trust or Use of Special Skill Enhancement Applies

The USPO appropriately applied a two-level upward adjustment under U.S.S.G. § 3B1.3, which encompasses defendant's abuse of his position of trust and his use of a special skill in the commission of his offense. As the government explained in its sentencing position, defendant's offense implicated both independent prongs of Section

3B1.3, and the enhancement applies. (See Dkt. No. 420 at 17-19.)

Defendant posits four objections to the application of the adjustment, all of which are without merit and should be overruled.

1. Section 3B1.3 Does Not Require Intentional Wrongdoing, and Defendant Engaged in Misconduct In Any Event

Defendant first contends, without authoritative support, that Section 3B1.3 "cannot apply where . . . the crime of conviction was not committed intentionally." (Obj. at 1.) Nothing in the text of Section 3B1.3 or the case law interpreting it restricts the provision solely to offenses involving an element of intentional wrongdoing.

Defendant points to an embezzlement case, United States v. Christiansen, 958 F.2d 285 (9th Cir. 1992), for the purported proposition that defendant must be found to have "exploited the trust relationship to facilitate the offense." (Obj. at 1.) But Christiansen was decided in 1992, when the commentary to Section 3B1.3 offered only "spare" guidance as to the application of the enhancement and had yet to be revamped significantly in 1993. United States v. Contreras, 581 F.3d 1163, 1165 (9th Cir. 2009), aff'd in part, vacated in part en banc, 593 F.3d 1135 (9th Cir. 2010); see also U.S.S.G. Amend. 492 (Nov. 1, 1993) (substantively rewriting application note 1 to Section 3B1.3). The Ninth Circuit has "looked on pre-1993 caselaw with disfavor" in interpreting Section 3B1.3. Contreras, 581 F.3d at 1166. Christiansen has dubious authority or relevance to this or any other case, and it says nothing about restricting the enhancement only to cases involving intent.[1]

[1] Christiansen has not been cited in the Section 3B1.1 context in the Ninth Circuit after Contreras nor by any published Ninth Circuit opinions at any time for the supposed "exploited the trust

(footnote cont'd on next page)

Defendant also points to some cases in which the enhancement has been applied to "intentional crime" (Obj. at 2), but identifies nothing barring its application to the situation here. Having sworn an oath to uphold the law, defendant recklessly and deliberately, as a matter of course, disregarded numerous safety requirements in place to protect the lives (both passengers and crew) entrusted to him. The analysis of the 3B1.3 enhancement is fact specific, and context matters. See United States v. Brickey, 289 F.3d 1144, 1155 (9th Cir. 2002) ("In applying the abuse of trust adjustment, the sentencing court must consider all relevant conduct as well as the conduct involved in the offense of conviction."). The context of this case, involving repeated and deliberate violations of core safety requirements, is no exception.

Moreover, the Ninth Circuit has recognized that supervisors in industries governed by safety regulations likely occupy a position of private trust vis-à-vis their employees. See United States v. Technic Servs., Inc., 314 F.3d 1031, 1052-53 (9th Cir. 2002) (licensed asbestos-remediation supervisor "held a position of [private] trust with respect to [his employees]" where employees relied on the defendant "to conduct the asbestos abatement in accordance with safety regulations"). Defendant held a position of trust as to his crew who counted on him for guidance and safety, and the same holds true for the passengers who put their lives in his hands and trusted he would follow the law and fulfill his safety obligations.

Defendant's reliance on the underlying charge being an "analogue

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relationship" requirement. The only other case defendant cites for this proposition, United States v. Armstrong, 165 F.3d 918 (9th Cir. 1998) (unpublished), summarily relies on the same flawed reasoning and, as an unpublished case from before 2007, is cited by defendant in violation of Ninth Circuit rules. See Ninth Circuit Rule 36-3(c).

to involuntary manslaughter" (Obj. at 2), is similarly misplaced. Defendant was charged and convicted with "misconduct and/or gross negligence of ship officers." (Dkt. No. 320 (Final Jury Instructions) at 4.) This required the government to prove, among other things, that defendant "engaged in misconduct and/or acted with gross negligence which means acting with wanton or reckless disregard for human life," and "he deliberately disregarded that substantial and unjustifiable risk of creating a potentially life-threatening condition of which he was aware." (Id. (emphases added).) The defense conceded at trial that defendant did not maintain a roving patrol, and the government presented overwhelming evidence that defendant habitually disregarded numerous other safety regulations, including training and drilling his crew on fire safety.

On this record, defendant astonishingly claims that "there was no dispute that this was a terrible, tragic accident." (Obj. at 2.) Nothing could be further from the truth. The mass atrocity defendant caused was predictable and preventable given his deliberate decisions to violate numerous safety requirements while his passengers and crew trusted him to keep them safe.

2. Section 3B1.1 Does Not Require Concealment

Defendant's second legal challenge to the enhancement once again gets the law wrong. Defendant claims that the government must prove defendant engaged in "concealment," but the plain text of Section 3B1.3 and controlling case law say otherwise.

Specifically, the enhancement applies where the defendant "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3 (emphasis added).

Commission or concealment of the offense is disjunctive, not conjunctive. Even a case defendant cites -- United States v. Green, 988 F.2d 123 (9th Cir. 1993) (another pre-2007 unpublished opinion) -- recognizes that the "enhancement applies if the defendant's position facilitated commission or concealment of the offense, whether or not it facilitated both." Id. at *2. Section 3B1.3 requires a showing of only one, not necessarily both, of facilitating the commission or concealment of the offense.

Defendant further misstates the law by relying on authority the Ninth Circuit has overruled. Defendant (impermissibly) cites the pre-2007 unpublished opinion in United States v. Armstrong, 165 F.3d 918 (9th Cir. 1998), claiming "[t]he primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult-to-detect wrong." (Obj. at 2-3 (quoting Armstrong, 165 F.3d at *2).) However, in Contreras, the Ninth Circuit found the "difficult-to-detect wrongs" test, which arose from a line of authority preceding the 1993 amendment to Section 3B1.3, to be "incompatible" with the new 3B1.3 commentary and no longer the focus of its analysis. Contreras, 581 F.3d at 1165-66. Sitting en banc, the Ninth Circuit overruled prior precedent in conflict with its interpretation of Section 3B1.3. Contreras, 593 F.3d at 1136; see also United States v. Harmath, 580 F. App'x 591, 597 n.2 (9th Cir. 2014) ("[M]any of the cases on which the parties rely, which use the 'difficult to detect' test for the 'abuse of trust' enhancement, are no longer good law." (relying on Contreras, 593 F.3d. at 1136, adopting, 581 F.3d at 1168)).

The Contreras court thus held, "[b]y the test's plain text, the element of discretion -- not ease of detection -- is the 'decisive

factor' in the enhancement." Contreras, 581 F.3d at 1166 (quoting United States v. Tribble, 206 F.3d 634, 637 (6th Cir. 2000)). Whether defendant holds a position of trust principally turns on his level of "professional or managerial discretion," and the question then becomes whether "the position 'significantly facilitate[d]' the commission of the crime." Id. at 1165. The ease of avoiding detection does not define a position of trust nor is there any requirement that the position facilitate concealment of the crime. Defendant, a licensed captain with full authority over the *Conception* at sea, plainly qualifies as holding a position of private trust under the discretion test; defendant's vast authority facilitated his offense by allowing him to take 39 passengers and crew to sea without fulfilling his core safety obligations.

Defendant's claim that "there was no concealment" is thus irrelevant. (Obj. at 3.) It's also wrong. For example, the defense claims that Coast Guard Inspector Daniel Hager testified that defendant "did not conceal anything about his operation of the [*Conception*]" during the ship's last inspection in February 2019. (Obj. at 3.) But in fact, upon the Court's inquiry, Hager clarified that he did not "specifically recall the inspection that was conducted in February 2019" with defendant. (Dkt. No. 369 at 57:22-24; see also id. at 59:15-18 (Hager does not recall "any specifics from that day").) The defense also misleadingly claims that "Hager testified that he would not have asked about roving patrols or night watchmen during an annual inspection." (Obj. at 3.) But in fact, Hager testified that, as his general practice, he would have shown defendant a copy of the *Conception's* Certificate of Inspection containing the roving patrol requirement in all capital letters on

the first page, ask if defendant had any questions, and "presume he understood [the requirement]" if defendant had none. (Dkt. No. 369 at 88:12-89:19.) Defendant's victims also stepped foot aboard the *Conception* with the expectation -- and false sense of security -- that their Captain was following the law and would keep them safe. The 34 victims are no longer able to express the depths of that broken trust. But their family and friends are, as reflected in the numerous victim impact statements submitted to the Court. (Dkt. No. 424 (filed under seal).)

Defendant's abuse of his position of private trust justifies the 2-level enhancement under Section 3B1.3.

3. There Is No Impermissible Double-Counting

Defendant's third challenge to the 3B1.3 enhancement further misapprehends the law albeit without citing a single case. Contrary to defendant's claim, Section 3B1.3 does not "amount to double counting" as to the "reckless operation of a means of transportation" factor in the 2A1.4 base offense level. (Obj. at 4.) The provisions reflect "distinct harms" and thus no double counting is implicated. United States v. Kubick, 205 F.3d 1117, 1125 (9th Cir. 1999).

Impermissible double counting "occurs where one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines." United States v. Reese, 2 F.3d 870, 895 (9th Cir. 1993) (emphasis added). The defense contends that "means of transportation" accounts for defendant being in a "trust position" as the "the captain of the vessel." (Obj. at 4.) The defense is wrong. The Sentencing Commission explained that the "means of transportation" offense level is meant to "address

disparities between federal and state sentences for vehicular manslaughter." U.S.S.G. Amend. 663 (Nov. 1, 2004). Defendant's base offense level thus accounts for the increased dangerousness of acting recklessly while operating a means of transportation (e.g., vehicular manslaughter). The base offense level neither contemplates nor requires that the operator of the means of transportation have passengers entrusted to them or that they have a special skill.

Thus, defendant's base offense level of 22 does not account for defendant's abuse of position of trust vis-à-vis the 34 people who were killed on his watch or his use of a special skill in operating the *Conception*. See Reese, 2 F.3d at 895 (no double counting where "base offense level will not necessarily have been set to capture the full extent of the wrongfulness of such behavior"); United States v. Archdale, 229 F.3d 861, 869 (9th Cir. 2000) (same).

The Sentencing Commission "plainly understands the concept of double counting, and expressly forbids it where it is not intended." Reese, 2 F.3d at 894 (quoting United States v. Williams, 954 F.2d 204, 208 (4th Cir. 1992)). Examples abound of offense guidelines doing just that, including with respect to the position of trust enhancement.[2] Section 2A1.4 is not included in this list because there is no possibility of double counting the 3A1.3 adjustment.

In sum, the Guidelines compel that Section 3B1.3 be applied here, because "when more than one kind of harm is attributable to a given aspect of a defendant's conduct, failure to enhance his

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[2] See, e.g., U.S.S.G. §§ 2A3.1, cmt. n.3(b); 2A3.2, cmt. n.2(b); 2A3.3, cmt. n.4; 2A3.4, cmt. n.4(b); 2B1.1, cmt. n.7, n.8(E)(i), n.11, n.16(C); 2C1.1, cmt. n.6; 2C1.2, cmt. n.4; 2C1.3, cmt. n.1; 2C1.5, cmt. n.5; 2D1.1, cmt. n.23; 2E5.1, cmt., n.5; 2G1.3, cmt. n.2(B); 2G2.1, cmt. n.5(B); 2G2.6, cmt. n.2(B); 2H1.1, cmt. n.5; 2P1.1, cmt. n.6; 2P1.2, cmt. n.2; 2T1.4, cmt. n.2.

punishment for each harm caused thereby would defeat the Commission's goal of proportionality in sentencing." Reese, 2 F.3d at 895.

4. The PSR's Factual Basis Supports the Enhancement

Finally, defendant erroneously claims the factual basis the PSR provides for application of the 3B1.3 enhancement is incorrect.

Incredibly, in challenging the PSR's factual basis, the defense selectively ignores half of the PSR's factual basis for the enhancement. (Obj. at 4.) In full, paragraph 67 of the PSR provides:

> Here, Boylan was the captain and master of the Conception which allowed him to take passengers and crew members out to sea to remote locations, hours away from any help. He was entrusted with the safety and wellbeing of his passengers and training his crew to maintain the passenger's safety. **When the fire was discovered on the Conception, Boylan was the first to abandon the boat by jumping into the ocean and ordered his crew members to abandon the boat without making any efforts to save the 33 passengers and one crewmember, even after two other crewmembers returned to the Conception to look for survivors**. Based on the foregoing, it is the undersigned Probation Officer's assessment that Boylan abused his position of trust to the passengers and their families to keep them safe.

(PSR ¶ 67 (sentence challenged by defendant in bold emphasis).)

The first two sentences that defendant omits go to the heart of his abuse of his position of trust and use of his special skill in the commission of his offense, as the government explains above and in its sentencing position. (Dkt. No. 420 at 17-19.)

So too does the bolded sentence that defendant challenges which, despite defendant's misleading spin, is accurate. The surviving crewmembers testified that defendant was the first person to jump off the *Conception*. (Dkt. No. 362 at 63:3-7; Dkt. No. 341 at 30:22-31:24; Dkt. No. 340 at 21:24-22:6.) He did so right after his Mayday call. Defendant never jumped down to the main deck with the rest of his crew to attempt to fight the fire or try to rescue the victims

trapped in the bunk room. First Galley Ryan Sims testified that, while still in the wheelhouse, defendant instructed him to "abandon ship," before defendant did so himself. (Dkt. No. 363 at 17:12-14.) First Deckhand Milton French remembered defendant "saying to get off the boat into the water" when defendant came up for air after jumping in the water. (Dkt. No. 362 at 64:10-12.) Defendant claims he "reboarded" the ship, but Second Captain Cullen Molitor testified that he and French "pulled [defendant] into the skiff . . . from the water" and Molitor did not recall defendant getting back on the *Conception*. (Dkt. No. 341 at 37:23-38:4.) Regardless of whether defendant reboarded, French could not remember "seeing Jerry doing anything" prior to their launching the skiff boat. (Id. at 70:23-71:3.) The PSR's statement that defendant "ordered his crew members to abandon the boat without making any efforts to save the 33 passengers and one crewmember" is accurate.

Defendant claims that a crewmember's testimony about a "five-second little huddle up" in the wheelhouse -- after years of no fire preparedness planning whatsoever -- and defendant's instruction to the crew to jump down to the main deck somehow supports his "efforts to save the passengers." (Obj. at 4.) The Court should reject this desperate rationalization. Defendant made no attempt to save the victims, jumped off the boat, and ordered his crew to do the same. In addition to his abysmal fire safety practices in the lead-up to the trip, these failures on the night of the fire underscore defendant's abuse of his position of trust.[3]

[3] Defendant does not separately challenge the other independent basis for the application of Section 3B1.3 here, i.e., "special skill" as a licensed captain. (See Dkt. No. 420 at 18-19.)

B. Zero-Point Offender Reduction Does Not Apply

Defendant challenges the PSR's conclusion that the Zero-Point Offender reduction in Section 4C1.1 does not apply, taking issue with the straightforward application of that provision. (Obj. at 5-6.)

Section 4C1.1(a)(4) provides that in order for a defendant to be eligible for the reduction, "the offense [of conviction] did not result in death or serious bodily injury." U.S.S.G. § 4C1.1(a)(4). Here, the jury necessarily found that defendant's misconduct and/or gross negligence "played a substantial part in bringing about the death [of one or more victims], so that the death was the direct result or a reasonably probable consequence of the Defendant's misconduct and/or gross negligence." (Dkt. No. 320 at 4.) Indeed, the indictment alleged, and the government proved at trial, that defendant's conduct "caused the deaths" of the 34 victims killed aboard the *Conception*. (Dkt. No. 1.) The offense thus "result[ed] in death" and defendant is ineligible for the 4C1.1 reduction.

To get around this clear bar to eligibility, defendant attempts for a third time -- having been twice rebuffed by the Court -- to import the case of Burrage v. United States, 571 U.S. 204 (2014), where it has no application. Burrage pertains to a challenge to the causation element in a death-resulting drug case; it has nothing to do with the offense at issue here, as the Court found in denying a motion to dismiss and a proposed jury instruction premised on Burrage (see Dkt. No. 359 at 9:11-11:23, 22:4-23:14), nor does it have anything to do with the Guidelines. And while Section 4C1.1(a)(4) does not appear to have been litigated much, at least one court observed that the "Sentencing Commission and Congress knew how to frame a disqualifying factor in terms of the broader 'result' of an

offense and did so in subsection (a)(4)." United States v. Yang, No. 23-100 (JDB), 2024 WL 519962, at *4 (Dist. D.C. Feb. 9, 2024). The Court once again should reject defendant's attempt to sow confusion where none exists. The Section 4C1.1 reduction does not apply.

C. Section 2A1.4 Base Offense Level Is Properly Calculated

Defendant states only that he "may object to the base offense level at a later date," notwithstanding the time restrictions of Rule 32(f)(1). (Obj. at 6.) For present purposes, the government notes that the PSR correctly calculates the base offense level (PSR ¶¶ 57-63), and the government provided additional Section 2A1.4 offense level analysis in its sentencing position. (Dkt. No. 420 at 13-17.)

III. DEFENDANT'S FACTUAL OBJECTIONS TO THE PSR SHOULD BE OVERRULED

A. Legal Standard

For disputed factual matters in the PSR, the court must "rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B). "Only specific factual objections trigger Rule 32(i)(3)(B). A specific factual objection addresses a factual inaccuracy; it does not merely object to recommendations, opinions, or conclusions." United States v. Petri, 731 F.3d 833, 841 (9th Cir. 2013) (cleaned up). As one court recognized:

> Rule 32 must be given a reasonable and practical construction. It should not be turned into a vehicle for verbal quibbles or argumentation about phrasing. The point of the rule is that misstatements of fact material to sentencing or to parole be corrected, not that presentence reports necessarily be phrased in every particular in such a way as to eliminate every nuance or implication to which a defendant might object.

Poor Thunder v. United States, 810 F.2d 817, 826 (8th Cir. 1987).

The government bears the burden of proving by a preponderance of the evidence any facts underlying a base offense level or sentencing enhancement. United States v. Franklin, 18 F.4th 1105, 1117 (9th Cir. 2021). Generally, "there is no limitation on the information which a court may consider in sentencing other than that the information bear sufficient indicia of reliability to support its probable accuracy," including hearsay. United States v. Nieves-Mercado, 847 F.3d 37, 42 (9th Cir. 2017); see also 18 U.S.C. § 3661.[4]

B. Information Regarding the *Vision* and *Condor Express* Fires Is Accurate and Relevant to Sentencing

***Vision* Fire.** The defense claims defendant was not informed about the fire on the *Vision* in October 2018 by *Vision* Captain Thomas Cappannelli, attaching a report of a government interview with Cappannelli from October 2, 2023 (just before trial). (Obj. at 7, Exh. A.) During that interview, Cappannelli acknowledged only that he "'he may have' spoken with BOYLAN regarding the M/V VISION battery fire but he cannot pinpoint a time." (Id., Exh. A at 1.) What the defense fails to mention, however, is that Cappannelli met with the government four years earlier, on October 10, 2019 -- just one year after the *Vision* fire in 2018. During that meeting, Cappannelli informed investigators that after the *Vision* fire incident, he "told [the Truth Aquatics owner], Boylan and [another Truth Aquatics employee]. In response, [the owner] told Cappannelli that passengers had been requesting more charging ports be installed in the bunkroom however [the owner] was against it because it would be a fire

[4] The Ninth Circuit reviews a sentencing court's factual findings for clear error, i.e., whether the findings "were illogical, implausible, or without support in the record." United States v. Spangle, 626 F.3d 488, 497 (9th Cir. 2010).

hazard," reflecting that Cappannelli's notification must have come before the *Conception* fire. (See **Exhibit 1** hereto at 2.) Cappannelli's interview from October 2019, closer in time to the *Vision* fire and before he understood the government sought to call him to testify against defendant (his former colleague), provides a reliable basis for establishing defendant's knowledge of the fire.

The defense's hysterical claim that "the entire PSR and the recommendation letter should be reevaluated" because of references to the *Vision* fire should be rejected. (Obj. at 7.) Whether or not defendant learned about that 2018 fire (he did), he should have known about and been prepared for the danger of a fire at sea as a licensed captain for decades. The Court agreed: "the defense can't be arguing [boat fires are not foreseeable] because if the defense were to argue that . . . I don't know if I would permit it, because it would be such an idiotic thing to say." (Dkt. No. 363 at 58:4-7.)

***Condor Express* Fire.** The government is attaching as **Exhibit 2** hereto a report of an interview with Captain Matthew Curto, which supplements his trial testimony about the *Condor Express* fire in March 2013 in the same six-vessel slip as the *Conception* (Dkt. No. 363 at 80-81). Taken together, the evidence demonstrates that the *Condor Express* fire overtook the whole wheelhouse and was a very big local media event; the burned ship sat for days in the same slip while defendant was captain of the *Conception*; the *Condor Express* was out of commission for months, noticeably absent from its slip right next to the *Conception*; numerous photos reflect the breadth of the *Condor Express* fire and the *Condor Express's* direct proximity to the *Conception* (see **Exhibit 3** hereto); Curto spoke to the Truth Aquatics owner about the fire; Curto worked part-time on Truth Aquatics ships,

including the *Conception*, during the time he worked on the *Condor Express*; and Curto "was '100%' confident Boylan had knowledge and awareness about the fire but he was not confident Boylan knew of the suspected cause." (Exh. 2 at 2.)

Contrary to the defense's contention, the Court did not ultimately "rule[] that the government could not introduce [*Condor Express* fire evidence] at trial" without other evidence of defendant working in March 2013. (Obj. at 8.) Indeed, the Court permitted Curto to testify about the *Condor Express* fire. (Dkt. No. 363 at 80-81.) The evidence demonstrates by a preponderance of the evidence that defendant knew about the *Condor Express* fire as well.

C. Information Regarding Lack of Crew Training and Drilling in Fire Safety Procedures Is Accurate

Defendant challenges statements in paragraphs 21 and 26(a), 26(b), and 26(c) of the PSR regarding the *Conception* crew's lack of training on the fire hose stations on the ship. (Obj. at 8-10.) The statements are all accurate, reflecting the largely uncontested fact at trial that defendant never conducted a single drill with his crew.

First Deckhand Milton French. The PSR accurately states that "French testified that Boylan never drilled French on how to use the *Conception's* fire stations." (PSR ¶ 26(a); Obj. at 9.) French testified that he had never used or activated the *Conception*'s firehoses nor seen them activated, had never seen them unspooled from their stations, and had never done a fire drill on the *Conception*. (Dkt. No. 361 at 170:16-18, 171:2-5, 172:5-6, 172:21-173:2; Dkt. No. 362 at 130:4-12.) The defense misleadingly points to French having run the "fire pump" on the boat, located down in the engine room, and French confirming that defendant "told [him] how to get the firehose

started from [the] fire station." (Obj. at 9.) But French explained they would not activate the fire stations on the main deck when running the pump in the engine room. (Dkt. No. 362 at 133:2-10.) And running the engine room fire pump to prevent corrosion and being told how to start a firehose is not the same thing as being shown how the firehoses are started, unspooling the actual hoses from the fire stations, and practicing through drills. It's akin to the local fire department never having taken out fire hoses for practice before responding to a fire. Defendant never trained or drilled French (or any crewmember) in any of these ways, as the PSR accurately reflects.

Second Captain Cullen Molitor. The PSR accurately states that "Molitor testified that Boylan had never drilled Molitor on how to use the ship's fire stations, and Molitor did not know how to use them." (PSR ¶ 26(a); Obj. at 9.) Molitor testified that he was never instructed how to use the firehoses, never used or activated one, and had never done a fire drill on the *Conception*. (Dkt. No. 364 at 75:22-76:9, 77:3-78:4; Dkt. No. 365 at 13:12-14.) Defendant points only to Molitor being shown where the fire stations were located and his confirmation he "understood how those worked." (Obj. at 9.) But once again, knowing where the fire hose is located and having a vague understanding of how it worked is not the same thing as practicing and learning how to use it through training and drills.

Second Deckhand Alexandra Kurtz. The PSR accurately states that the "testimonies of the surviving crewmembers indicated that Kurtz had never used the ship's fire stations because Boylan had never drilled her." (PSR ¶ 26(c); Obj. at 9-10.) The defense does not dispute that the surviving crewmembers confirmed that defendant did not conduct any drills with them or Kurtz, who was working on only

her second overnight trip on the *Conception*. Rather, the defense points solely to the testimony of a former crewmember (Evan Jones Toscano) who testified about French (not defendant) taking him and Kurtz down to the engine room (not the fire stations) to show how the fire pump worked. Defendant also points to Toscano confirming he and Kurtz were shown the location of the fire stations. None of this contradicts that Kurtz (like the other crewmembers) had never used a fire station, including through drills by defendant.[5]

Defendant's contention that the firehoses were not used solely because of the "rapidly accelerating fire on the boat," and not because of lack of crew training (Obj. at 10), underscores the continued fallacy of his defense: had defendant maintained a roving patrol as required, his crew could have caught the fire before it grew and, had the crew been trained and drilled on the fire safety equipment as required, put the fire out.

D. Information Regarding the *Conception* Fire Is Accurate

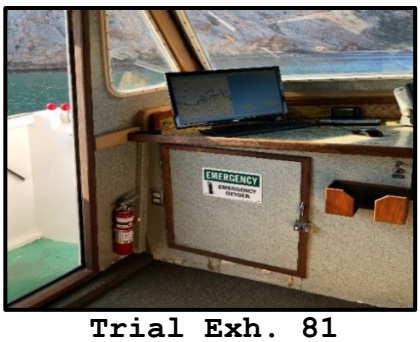
Defendant incorrectly claims the PSR's description of the fire on September 2, 2019 is "riddled with factual errors," contesting four statements. (Obj. at 10-13.) Each statement is accurate.

Second Galley Michael Kohls "then jumped down to the main deck [from] the port side of the sun deck. He ran past the fire station on the port side of the main deck twice, not knowing that the fire station was there or how to use it" (PSR ¶ 31). This statement is accurate and fully supported by Kohls's testimony, during which he described, with the aid of photographs of the *Conception*, the steps

[5] Galley crew Ryan Sims and Michael Kohls also testified they were never trained on the fire hoses nor took part in any drills on the *Conception*. (Dkt. No. 362 at 153:18-154:18; Dkt. No. 363 at 11:1-7.)

he took after first seeing the fire. (Dkt. No. 340 at 16:20-20:22.) Defendant ignores Kohls's firsthand testimony, citing instead to testimony of two other crewmembers who also were in the heat of the moment. Moreover, Kohls's testimony about trying to get to fire extinguishers in the salon, as he understood the role of the galley crew to be, does not change the PSR's accurate statement that Kohls ran by the portside fire station twice without knowing it was there nor how to use it. (See Dkt. No. 362 at 153:18-154:18.) Had defendant properly trained Kohls, in the two years Kohls worked on the *Conception*, how to use the fire stations, Kohls could have poured unlimited amounts of water from the ocean on the fire.

"No one grabbed the fire ax or fire extinguisher from the wheelhouse prior to jumping" (PSR ¶ 32). This statement is accurate. While defendant is correct that First Galley Ryan Sims testified that defendant told him to grab the fire extinguisher in the wheelhouse, defendant did not help Sims do so and quickly told Sims to "abandon ship" when Sims was unable to grab it. (Dkt. No. 363 at 16:4-5, 17:12-14.) The fire extinguisher was within arm's reach of defendant when he made his Mayday call from the wheelhouse, as reflected in this photograph taken just days before the fire:



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The fire ax was located on the wall just behind where defendant sat in the wheelhouse. (Dkt. No. 364 at 79:18-80:9.) Defendant did not

use or drop down the fire extinguisher or fire ax to any of his crew who had jumped down to the main deck. (Id.; Dkt. No. 341 at 30:9-18.)

"Boylan did not give any commands on how to fight the fire" (PSR ¶ 38). This statement is accurate. Defendant points, again, to the "five-second little huddle up" in the wheelhouse and defendant's instruction to the crew to jump down to the main deck and get people out. (Obj. at 12.) This has nothing to do with commanding his crew how to fight the fire, nor could a "five-second little huddle up" in the midst of a fire make up for months and years of defendant's failure to train his crew in firefighting. Defendant also points to his instructing Sims to get the fire extinguisher but neglects to mention he instructed Sims to "abandon ship" immediately thereafter.

"When the fire was discovered on the *Conception*, Boylan was the first to abandon the boat by jumping into the ocean and ordered his crew members to abandon the boat without making any efforts to save the 33 passengers and one crewmember (PSR ¶ 67). This statement is accurate, as the government explained above in response to defendant's challenge to the factual basis for the Section 3B1.3 enhancement. (See supra pp. 9-10.)

E. Statements Regarding the Escape Hatch Are Neither Inaccurate Nor Factual Assertions

Defendant challenges two sentences in paragraph 62 of the PSR about it being "unknown" whether the victims could have escaped through the escape hatch had they known of its existence and it being "unknown" whether anything was on top of the escape hatch obstructing the victims' use of it. (Obj. at 13-15.) As an initial matter, the statements themselves are accurate as written in terms of what was "unknown." Second, none of the information the defense points to in

seeking to rebut these non-factual assertions changes the fact that defendant never took the passengers down to the bunkroom, or directed any of his crewmembers to do so, to show his passengers how to access the escape hatch. And third, under Rule 32(i)(3)(B), the Court is not required to resolve objections to these non-factual assertions that amount to "opinions" or "conclusions." Petri, 731 F.3d at 841.

F. Information Regarding Defendant's Other Failures Is Accurate

Defendant further challenges the accuracy and inclusion of several other statements in the PSR regarding other safety failures by defendant as Captain of the *Conception*. (Obj. at 15-19.) Defendant appears to contend that certain of these statements should not be included in the PSR or considered at sentencing because of the Court's rulings as to admissibility of certain evidence at trial. At sentencing, of course, the Court may consider any "relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3; see also Nieves-Mercado, 847 F.3d at 42 (same).

As for defendant's contentions regarding the accuracy of the statements, the government responds as follows.

Defendant "allowed passengers to board the *Conception* and sleep in the bunkroom while it was docked the night before departure before crew members were required to report to the ship" (PSR ¶¶ 21, 25) and "did not require his crew to report to the ship until 3:00 a.m. on August 31, 2019" (Id. ¶ 24). Defendant does not contest the accuracy of these statements about the night-before boarding procedures for the *Conception* so much as the description of this being "Boylan's

practice," as the defense similarly contested at trial. (Obj. at 15-16.) But it is what defendant did and thus his "practice," regardless of whether Truth Aquatics allowed passengers to board the night before departure or other ships allowed the same.[6] Defendant was a licensed captain, holding a Merchant Mariner Credential since 1985 (renewing it every five years) and serving as Captain of the *Conception* for decades. Defendant swore an oath to uphold the law and ensure the safety of his passengers. If defendant had any concerns about not upholding that oath or breaking the law, he was obligated to raise it with his employer and not operate the *Conception* in violation of his duties as the Captain. He never did.

"Boylan also allowed passengers to store coolers of beer on the top of the escape hatch in the salon. The escape hatch could not be opened from the bunkroom when a beer cooler was on top of it . . . The passenger saw ice chests being stored on top of the escape hatch on multiple occasions, unsuccessfully tried to open the escape hatch with an ice chest on top, and addressed his concerns to Boylan" (PSR ¶ 22). This statement is accurate, supported by information provided by former passenger Mark Copple prior to trial. Indeed, defendant attaches a report of an interview with Copple conducted on September 13, 2019 (Obj., Exh. E) -- but fails to mention that Copple spoke with the government again on October 17, 2023, in advance of trial, with a report produced to the defense in discovery. (See **Exhibit 4**

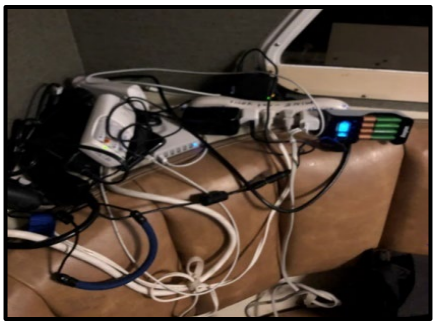
[6] One former *Conception* passenger described the practice of not holding an orientation meeting until the morning after departure as "unusual" based on his experience on scuba diving trips on other boats. (Dkt. No. 365 at 20:20-25 (Mark Copple: "Well, normally you get on board and everything is done at that time you get on board. After everybody is on board, there is a briefing and just a safety type talk but, yeah.").)

hereto.) Copple described seeing "times" (plural) when an ice chest was on top of the escape hatch, and on one occasion he tried to open the hatch from the bunkroom but was unable to do so due to an ice chest. (Id. at 2.) The defense contests that Copple raised his concern directly with defendant as opposed to another crewmember; defendant claims "[t]here is no reason to believe that, had Mr. Copple had this conversation directly with Mr. Boylan, he would not have stated that directly." (Obj. at 17.) As the defense knows, Copple did state directly that he discussed this with defendant: "Copple spoke to Boylan about it and Boylan said there was not another good place to store [the ice chest]." (Exh. 5 at 2.)

"Boylan, a smoker, did not provide instructions as to where passengers should smoke cigarettes and how passengers should dispose of their lit cigarette butts" (PSR ¶ 28). Defendant does not contest the accuracy but rather the inclusion of this statement, which is relevant to defendant's lack of care as to basic fire safety procedures aboard the ship he captained. Contrary to the defense's aspersions, the government does not seek to "imbue the sentencing proceedings in this case with the improper speculation that a disposed cigarette may have caused the fire." (Obj. at 17.) Indeed, the Court recognized the relevance of defendant's lack of fire safety guidance to passengers on cigarette disposal, permitting the government to inquire on this issue with Second Captain Molitor. (See Dkt. No. 341 at 6:21-10:21.) Defendant further points to there being "no statute, rule, regulation, company policy, or other authority" governing cigarette fire safety as a reason this information should not be included (Obj. at 17), which is ironic given the defense contested the government pointing to fire safety

regulations earlier in this case. In any event, not instructing passengers about where to smoke and dispose of cigarettes on an isolated ship in the Pacific Ocean plainly bears upon defendant's overall abysmal fire safety practices on the *Conception*.

"[Boylan] also failed to inform his passengers that they should not overload the ship's electrical outlets when charging their equipment's batteries" (PSR ¶ 28); and "[a] photograph of a power strip taken by a passenger that night depicted an overloaded power strip" (Id. ¶ 29). Defendant similarly does not contest the accuracy of these statements but rather their inclusion in the PSR. (Obj. at 18.) The rampant overcharging of batteries on the *Conception* at night -- when defendant did not maintain a roving patrol with a crew unprepared to fight a fire -- is directly relevant to defendant's cavalier attitude toward his fire safety obligations. Defendant points once again to there not being any specific law, rule, or policy that compelled him to instruct his passengers not to overuse an electrical outlet. But it should not have taken anything more than common sense and prudent seamanship to appreciate that the following overloaded power strip, which was photographed on the *Conception's* fatal trip, constituted a potential fire hazard:



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In fact, former passenger Copple was shown this photograph and told investigators that he had seen this problem three times worse on the

Conception. (Exh. 4 at 2.) Crew witnesses testified at trial that the overnight charging (and overcharging) of batteries and devices was the norm. (Dkt. No. 340 at 9:21-23; Dkt. 341 at 17:9-18:5; Dkt. No. 362 at 49:23-50:10.) Defendant's claim that he did not know about this practice (Obj. at 18), which was out in the open virtually every night in the salon on a ship he captained for decades, is preposterous. Given the obvious risks of not maintaining a roving patrol with an inexperienced and untrained crew, defendant's further failure to control the overnight overcharging of batteries on the *Conception* during the Labor Day Weekend trip and other trips is relevant conduct for sentencing.[7]

"Boylan failed to have passengers don life jackets during the morning briefing despite Coast Guard regulations requiring him to do so" (PSR ¶ 28). Defendant does not contest the accuracy of this statement, but rather only its relevance. Coast Guard regulations required defendant to have his passengers don life jackets during the safety briefings on trips lasting more than 24 hours. See 46 C.F.R. § 185.506(e). Defendant never did so, consistent with his practice of ignoring numerous other safety regulations. Even though this was not expressly a fire safety practice, defendant's overall disregard for his safety obligations is relevant at sentencing.

G. Victims' Cause of Death

The government agrees with defendant that the PSR's statement that the "34 victims were burned to death" does not accurately reflect the cause of death. (PSR ¶ 130; Obj. at 19.) However, in

[7] Defendant notes that the power strip photograph was not admitted at trial but briefly published during witness testimony. (Obj. at 18.) The error was inadvertent and corrected immediately. (Dkt. No. 362 at 10:8-11:5.)

paragraph 42, the PSR correctly states that the 34 victims "trapped in the bunkroom of the *Conception* died from smoke inhalation and asphyxiation by carbon monoxide poisoning." (PSR ¶ 42.) Paragraph 130 should be revised to incorporate that information.

H. Defendant's Illegal Dumping of Sewage

While not contesting the accuracy of the information, defendant contends the PSR should not include reference to his practice of illegally dumping sewage from the *Conception's* "black water tank" in protected marine areas, including in the vicinity of his passengers when the ship was anchored at dive sites. (PSR ¶ 78; Obj. at 19.) Defendant's failure to obey regulations governing the disposal of sewage, including into the waters in which his passengers dove, further underscores his utter disregard for the law and the safety of his passengers. This is relevant to the 18 U.S.C. § 3553(a) factors, including the history and characteristics of the defendant and the need to promote respect for the law, and should be included in the PSR. Defendant's concern about the "salacious" nature of his misconduct is exactly the point (Obj. at 19); there is no longer a jury or evidentiary rules governing admissibility, and the Court should account for defendant's outrageous conduct and violations of the law as Captain of the *Conception* in determining his sentence.

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court overrule defendant's objections to the Presentence Investigation Report.